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Thomas A. Frist, Jr., Edward Stack,  
Health Services Acquisition Corp.  
and Nevada Psychiatric Company, Inc.

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEVADA

BARBARA J. SUTER, HORACE BURL )  
SUTER, JR., RACHAEL J. SUTER, )  
Plaintiffs, )  
)

Case No. CV-N-99-00286  
DWH (RAM)

vs. )  
)  
NEAL G. CURY, JR., HOSPITAL )  
CORPORATION OF AMERICA, COLUMBIA- )  
HCA, INC., THOMAS A. FRIST, JR., )  
EDWARD STACK, JAMES DON, HEALTH )  
ACQUISITION SERVICES, INC., )  
NEVADA PSYCHIATRIC COMPANY, INC., )  
DOE DOCTORS I-XX, DOES I-X, )  
Defendants. )  
/

OPPOSITION TO PLAINTIFFS' MOTION FOR CRATEO INDICATION TO CONSIDER  
MOTION FOR RELIEF FROM ORDER AND TO RE-OPEN CASE FILE

Plaintiffs have moved this Court for an indication, pursuant to  
Crateo, Inc. v. Intermark, Inc., 536 F.2d 862 (9<sup>th</sup> Cir. 1976), that  
this Court would be willing to entertain, and grant, a motion for

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3 relief from the judgment in this case based on plaintiffs' claim of  
4 "newly discovery evidence." Defendants oppose the motion and request  
5 the Court decline to issue that indication. Plaintiffs' motion is  
6 both legally and factually unsupported.

7 Dated this 26th day of March, 2001.

8 LIONEL SAWYER & COLLINS

9  
10 By 

Christopher R. Hooper

Allen J. Wilt

11  
12 Attorneys for Neal G. Cury, Hospital  
13 Corporation of America, Thomas A.  
14 Frist, Jr., Edward Stack, Health  
Services Acquisition Corp. and Nevada  
Psychiatric Company, Inc.

15 POINTS AND AUTHORITIES

16 I. Introduction

17 To date, plaintiffs have presented their arguments before four  
18 different courts, including Nevada's Second Judicial District Court,  
19 the Nevada Supreme Court, this Court, and the Ninth Circuit Court of  
20 Appeals. In their latest litigation maneuver, plaintiffs seek to  
21 have this Court vacate its earlier order of dismissal, which  
22 currently is the subject of a pending appeal in the Ninth Circuit  
23 Court of Appeals.

24  
25 The Order plaintiffs wish to have set aside determined that this  
26 Court lacks subject matter jurisdiction over the plaintiffs' claims  
27 pursuant to the Rooker-Feldman Doctrine. Nothing in the plaintiffs'  
28 motion or the exhibits attached to it affects that order or

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3 undermines it in any way. Plaintiffs' motion should, therefore, be  
4 denied.

5 II. Background

6 In 1994, Barbara, Burl and their daughter Rachael Suter sued  
7 Nevada Psychiatric Company, Inc. ("NPC"), several individual doctors  
8 and other corporate defendants in Nevada state court asserting  
9 contract and tort claims arising from psychiatric treatment provided  
10 to Rachael Suter. NPC reached a settlement with Rachael Suter, and  
11 all of the parents' claims against NPC were either dismissed or  
12 resolved against them on summary judgment. Similarly, all of  
13 plaintiffs' claims against the defendant doctors were either  
14 dismissed or resolved against them on summary judgment. The Suters  
15 appealed to the Nevada Supreme Court, which dismissed their appeal  
16 in October of 1998.

17  
18 Dissatisfied with the results of their state court litigation,  
19 plaintiffs filed suit in this Court seeking damages and rescission  
20 of "all orders entered by the district court in the Suter case." The  
21 Suters' Complaint in this case asserts several causes of action, for  
22 breach of the settlement agreement, for fraud, for violation of  
23 plaintiffs' civil rights and others, all of which stem from what the  
24 Suters claim was "litigation fraud" in their state court case. See  
25 generally First Amended Complaint. The Suters complained they were  
26 deprived of a fair result in their state court litigation by conduct  
27 such as improper influence by Nevada State Court judges, a member of  
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3 the Nevada Legislature, and the wife of a Nevada Supreme Court  
4 Justice. Id. at p. 5.

5 This Court dismissed plaintiffs' Amended Complaint, finding that  
6 the Rooker-Feldman Doctrine deprived this Court of subject matter  
7 jurisdiction to set aside the results of the state court litigation.  
8 Plaintiffs timely appealed that order to the Ninth Circuit Court of  
9 Appeals. Now, plaintiffs request an indication from this Court that  
10 it would entertain and grant a Rule 60 motion to vacate that order  
11 based upon "newly discovered evidence."  
12

13 III. Legal Standard

14 Federal Rule of Civil Procedure 60 provides in pertinent part  
15 that a district court may on motion made within a reasonable time  
16 "relieve a party ... from a final judgment, order, or proceeding" for  
17 a number of reasons, including newly-discovered evidence. See Fed.  
18 R. Civ. P. 60(b). Because the appeal in this case is pending, this  
19 Court has no jurisdiction to enter a Rule 60 order. See Crateo, Inc.  
20 v. Intermark, Inc., 536 F.2d 862, 869 (9<sup>th</sup> Cir. 1976). At most, this  
21 Court may indicate that it would entertain, or that it would grant,  
22 a Rule 60 motion in light of the justification offered. See id. If  
23 this Court were to give such an indication, plaintiffs would then be  
24 permitted to apply to the appellate court for a remand. See id.  
25

26 In order to succeed on a Rule 60(b)(2) motion, the movant must  
27 show that the new evidence "(1) existed at the time of the trial, (2)  
28 could not have been discovered through due diligence, and (3) was of

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3 such magnitude that production of it earlier would have been likely  
4 to change the disposition of the case." Jones v. Aero/Chem Corp.,  
5 921 F.2d 875, 878 (9<sup>th</sup> Cir. 1990) (internal quotation omitted); see  
6 also Wilson v. Upjohn Co., 808 F.Supp. 1321, 1323 (S.D. Ohio 1992)  
7 ("The moving party has an extremely difficult burden to overcome  
8 before the court can grant relief under Rule 60(b)(2)"). The Suters'  
9 motion fails on all three grounds.

#### 10 IV. Argument

##### 11 **A. The evidence did not exist at the time of this Court's** 12 **order.**

13 The Suters make no attempt to show that the "new evidence"  
14 attached to their motion existed at the time this Court entered its  
15 order dismissing this matter on August 28, 2000. However, a review  
16 of those exhibits reveals them to be either undated or dated  
17 variously between December 11, 2000 and December 15, 2000 -- several  
18 months after this Court entered its order. The Suters have therefore  
19 failed to meet this requirement.  
20

##### 21 **B. The Suters have failed to establish due diligence.**

22 To the extent the Suters seek to offer this evidence to show  
23 that there were civil and criminal investigations underway in other  
24 districts prior to this Court's order, or as proof of acts committed  
25 before that order, they have failed to make any showing that such  
26 evidence could not have been discovered through due diligence.  
27 Barbara Suter's own affidavit, attached as Exhibit A to plaintiffs'  
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3 motion, attests that she was aware at that time that other states and  
4 federal agencies were investigating HCA and its officers for  
5 "criminal conduct."<sup>1</sup> The Suters' failure to investigate further what  
6 Barbara Suter swore she was aware of in November of 1999 cannot  
7 establish due diligence. See Contempo Metal Furniture Co. of  
8 California v. East Texas Motor Freight Lines, Inc., 661 F.2d 761, 767  
9 (9<sup>th</sup> Cir. 1981) (failure to investigate further what one party  
10 believed to be the facts prior to trial does not establish due  
11 diligence justifying a new trial).<sup>2</sup>

12  
13 **C. The Suters' "new evidence" would not have affected the**  
14 **disposition of the case.**

15 Finally, and most important, the "new evidence" offered by the

16 <sup>1</sup> Barbara Suter's affidavit provides in part:

17 1. If called upon to testify, I have personal knowledge  
18 of the following facts and could competently testify to  
19 the same as follows.

20 2. I have been involved in providing information to the  
21 United States Attorney's Office concerning this case and  
22 understand that certain high level HCA officials have been  
23 found guilty of felonies in the State of Florida.  
24 Currently, those convicted HCA officials are negotiating  
25 a deal to implicate other HCA officials.

26 3. I am informed that a number of other States and  
27 Federal Agencies are investigating HCA, its previous and  
28 current officers for similar criminal conduct.

Affidavit of Barbara J. Suter, Exhibit A to Plaintiffs' motion at p.  
1.

<sup>2</sup> The same standard applies to a Rule 59 motion for new  
trial and a motion under Rule 60(b)(2). The only distinction is  
that Rule 60(b)(2), allowing a more belated attack on the judgment,  
may require a stronger showing. Jones, 921 F.2d at 878.

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3 Suters is irrelevant to this Court's decision that it lacks subject  
4 matter jurisdiction over their claim. The Suters, therefore, cannot  
5 establish that the evidence would have been likely to change that  
6 determination.

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8 **1. The evidence is irrelevant to the Rooker-Feldman  
Determination.**

9 This Court dismissed plaintiffs' Complaint because it determined  
10 it lacked subject matter jurisdiction pursuant to the Rooker-Feldman  
11 Doctrine. Defendants' Motion, and this Court's Order dismissing the  
12 case, were based upon the allegations in plaintiffs' Amended  
13 Complaint and the relief they requested in that Complaint -- not on  
14 any evidentiary showing on the merits of the case. Even if  
15 plaintiffs' proffered evidence established what they claim it does,  
16 and supported the argument that their Complaint had substantive merit  
17 (it does neither), that evidence does nothing to support this Court's  
18 exercise of jurisdiction to overrule state court judgments.  
19 Plaintiffs have neither argued nor cited authority to suggest it  
20 would.  
21

22 **2. Plaintiffs' "newly discovery evidence" is irrelevant**  
23 **to plaintiffs' Complaint in this case**

24 Not only is plaintiffs' proffered new evidence irrelevant to  
25 this Court's determination on subject matter jurisdiction grounds,  
26 that evidence does not even support the substantive allegations of  
27 the Suters' Complaint in this case. Throughout the Suters' Motion,  
28 counsel repeatedly declares that the evidence attached to that motion

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3 contains and constitutes HCA's "admission" to the conduct alleged by  
4 the Suters in the present action. See Motion at p. 1, ll. 21-22; p.  
5 3, ll. 9-10, p. 5, ll. 25-26, p. 6, ll. 6-7. As the Court may  
6 readily discern from its own review of the Complaint and the  
7 proffered evidence, these representations are simply false. ~~at~~  
8 Suters' Complaint in this case alleged a breach of the settlement  
9 agreement in their state court case, and alleged that the Suters lost  
10 their state court case as a result of witness tampering, false  
11 affidavits, and misconduct by Nevada state employees, judges, and a  
12 state senator. These (unfounded) allegations are addressed nowhere  
13 in plaintiffs' claimed "newly discovered evidence." Those new  
14 materials relate to charges of Medicare and Medicaid billing  
15 violations -- improper billing practices, physician compensation and  
16 business transactions alleged to have harmed the government, not the  
17 Suters.  
18

19 Those materials have nothing to do with the allegations asserted  
20 by the Suters in this case, accusing defendants and numerous state  
21 officials with misconduct in the course of the Suters' private  
22 litigation. Contrary to the Suters' misrepresentations, those  
23 materials do not pertain to their Complaint at all, much less to the  
24 limited ruling by this Court applying the Rooker-Feldman Doctrine.  
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## 26 V. Conclusion

27 The evidence offered by the Suters is insufficient to support  
28 their request to set aside the Court's order pursuant to Rule 60(b).



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3 The Suters have not shown that the evidence existed at the time of  
4 this Court's order, nor have they shown why they could not with due  
5 diligence have timely produced evidence of the underlying  
6 investigations referred to in those materials. The evidence is  
7 irrelevant to this Court's ruling applying the Rooker-Feldman  
8 Doctrine, and does not even say what the Suters claim it does.  
9 Defendants respectfully request that this Court decline to indicate  
10 that it would grant plaintiffs' motion to set aside the order of  
11 August 18, 2000.  
12

13 Dated this 26th day of March, 2001.

14 LIONEL SAWYER & COLLINS

15  
16 By   
17

Christopher R. Hooper  
Allen J. Wilt

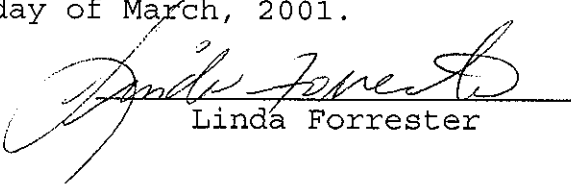
18 Attorneys for Neal G. Cury, Hospital  
19 Corporation of America, Thomas A.  
20 Frist, Jr., Edward Stack, Health  
21 Services Acquisition Corp. and Nevada  
22 Psychiatric Company, Inc.  
23  
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CERTIFICATE OF MAILING

The undersigned, being an employee of Lionel Sawyer & Collins, 50 West Liberty Street, Suite 1100, Reno, Nevada 89501 certifies that on this date a copy of Defendants' Opposition to Plaintiffs' Motion for Crated Indication to Consider Motion for Relief from Order and to Re-Open Case File was mailed to the following interested party at his last known address:

Kevin Mirch  
Attorney at Law  
201 W. Liberty Street  
Suite 201  
P. O. Box 5396  
Reno, Nevada 89513

DATED this 26<sup>th</sup> day of March, 2001.

  
Linda Forrester